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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife; MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,

Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF THE JEWISH RIGHTS COUNCIL AS *AMICUS CURIAE*

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BRIEF OF THE JEWISH RIGHTS COUNCIL AS *AMICUS CURIAE*

Interest of the *Amicus*

The Jewish Rights Council, *Amicus*, was founded in 1971 for the purpose of ensuring and promoting equality of all

persons before the law, and in that manner to strengthen and preserve the security and constitutional rights of Jews in America through the preservation of the equal rights of all Americans. The Jewish Rights Council believes that the welfare of Jews in this country is inseparably related to and dependent upon the equality of treatment of all Americans, regardless of race, religion, creed, or ethnic background. The membership of the Jewish Rights Council includes over one hundred Rabbis from over thirteen states, reprecenting Orthodox, Conservative and Reform Congregations. The leadership of the Jewish Rights Council includes Rabbis who marched with the late Reverend Martin Luther King in Selma, Alabama, for the equality of all persons before the law.

The instant case raises a crucial issue under the Equal Protection Clause of the Fourteenth Amendment, involving the use by an agency of a State of race as a criterion for admission to a State law school, in order to obtain a racial balance of certain minority group members in the student body.

The merit system of admissions to institutions of higher education has been one of the keystones for the success of the Jew and other minorities in America; and therefore the Jewish Rights Council has a particular interest in the preservation of academic excellence as well as equality of opportunity in public education. Being composed of members of an historically persecuted minority, the Jewish Rights Council is especially sensitive to any and all forms of discrimination based upon race, religion, or ethnic background. On the other hand, the Jewish Rights Council firmly believes

that it is extremely important for the preservation of our American way of life, with its concomitant "American dream," that the rights of one group shall not be sacrificed in the name of the promotion of another minority. Therefore, the interest of *Amicus* herein is to oppose the use of racial quota systems in public institutions of higher learning or in any other public function. For it is but a tiny step from the concept of a "racially balanced student body" (opinion below, 507 P.2d 1169, 1184) to the infamous *numerus clausus* of the dark past.

On the other hand, the Jewish Rights Council wishes to make it abundantly clear that there must never be the slightest retreat from the principle of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), that a State or its agents may not deny the equal access to a public school (or other facility) to any person on the basis of race, religion, ethnic background or creed. This is the promise of *Brown* from which there must be no retreat anywhere in our Nation.

Consent to Filing

This Amicus Curiae brief is being filed with the consent of all parties to the proceeding.

Opinions Below

The opinion of the trial court, Superior Court of the State of Washington, County of King, is not reported. The opinion of the Washington Supreme Court is reported at 507 P.2d 1169 under the style of *DeFunis* v. *Odegaard*, and will be referred to hereinafter as "*DeFunis* below."

Statement of the Case

In 1970, the University of Washington, a state institution, embarked on an "affirmative action" program with a racially preferential standard for admission to its School of Law in place of its previous racially non-discriminatory admissions procedures. In determining who should be offered admission to the Law School, a law school admissions committee utilized a policy whereby "minority" applicants were treated separately with special consideration and more favorably than other applicants to the Law School. *DeFunis* below, 507 P.2d at 1175-6, 1184. As a result of this dual admissions program, over 50% (37/70) of those "minority" students who applied were offered admission [Brief of University as Appellants in Washington State Supreme Court, at p. 9, Proposed Finding 8], whereas less than 20% (275/1601) of all student applicants were offered admission. 507 P. 2d at 1172, 1176. Indeed, some "minority" applicants, with college grades and Law School Admission Test (LSAT) scores so low that they would have been summarily denied admission if they had not been "minority" students, were nonetheless offered admission. 507 P.2d at 1176. Most (36/37) of the "minority" students who were admitted had lower scores than Marco DeFunis, the petitioner herein. *Ibid.* Marco DeFunis is fully qualified and capable of satisfactory attendance at the law school. *Ibid.* But he was not given the same treatment as a "minority" group member applying to the law school, and was rejected for admission.

Summary of Argument

Particularly in the absence of any previous history of invidious discrimination on the basis of race at the University of Washington law school, that school itself introduced the evil of racial criteria for admission when it instituted the challenged dual admissions program in the name of "affirmative action," to the detriment and disparagement of the personal right of Equal Protection of Marco DeFunis under the Fourteenth Amendment. Since racial classifications are vague and dangerous, they bear an extremely heavy burden of justification when implemented by the agency of a State. Therefore, the trial judge was correct in declaring the dual admissions program unconstitutional and in ordering that Marco DeFunis be admitted to the law school, because there is no justification for the dual admissions program.

ARGUMENT

POINT I

A State agency's imposition of racially preferential criteria for admission to a State law school violates the constitutional right of equal protection of law as to those qualified students who were not afforded the same preference, particularly in the absence of previous discrimination or segregation on the basis of race at the law school.

Racial classifications are at once vague and dangerous. For example, the Nazis defined as Jewish any person who had one-quarter or more Jewish blood. Raul Hilberg, *The Destruction of the European Jews,* p. 48 (Quandrangle

Paperback ed., 1967); First Regulation to the Reich Citizenship Law, Nov. 14, 1935. And, in this country's own history of miscegenation laws, the Negro has been variously defined as ranging from "one-eighth or more of African or Negro blood" to any "ascertainable" amount of Negro blood; whereas the American Indian was not considered a colored person in Virginia if he had only one-sixteenth or less of American Indian blood. *Loving* v. *Virginia,* 388 U.S. 1, 5 fn. 4 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184, 187 fn. 6 (1964). Thus, any preferential treatment of "minority" group members by a State faces an initial hurdle of the vice of vagueness, as well as the principle that our constitution requires that state action be "color blind"; *Plessy* v. *Ferguson,* 163 U.S. 537, 559 (1896, dissent. op.); *Bell* v. *Maryland,* 378 U.S. 226, 288 (1964); and this is true particularly in cases where, as here, the State has not been guilty of invidious past discrimination on the basis of race to identify just what constitutes a "minority" person to be preferred and just what constitutes "other" persons not to be preferred.

The situation in the case at bar, where an agency of the State has introduced race as a criterion for opportunities, where no such evil existed previously, constitutes a distortion of the Constitution. For the Equal Protection Clause of the Constitution protects *all* persons, regardless of the group to which they may happen to belong, "without any regard to any difference of race, color, or of nationality." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886). In its zeal to achieve a "racially balanced student body" (*DeFunis* below, 507 P.2d at 1184), the Washington State law school gave "special consideration" [507 P. 2d at 1184] to

certain "minorities" to the detriment of Marco DeFunis, who was rejected for admission to the law school. Thereby, the State put the burden of the history of past discriminations elsewhere against these "minorities" squarely on the shoulders of DeFunis who had nothing to do with that history.

In exalting "proportionate representation" [507 P.2d at 1184] over equal opportunity based upon achievement and merit, the State created two types of law students, quota-"minority"-law-students and non-quota-"minority"-law-students, instead of just law-students. In so doing, the law school imposed an "implication of inferiority" [Graglia, *Special Admissions of the "Culturally Deprived" to Law School,* 119 Univ. of Penna. L. Rev. 351, 356 (1970)] upon the quota-"minority"-law-students in pursuit of a goal which is dubious at best and at the expense of Equal Protection of Laws for Marco DeFunis. For the Constitution protects the individual rights of "any person" [Amendment XIV] and not any group rights whatsoever. And if the type of preferential admissions policy instituted by the University of Washington is allowed to continue, then this country will soon be faced with two types of law schools, quota-law-schools and non-quota-law-schools, instead of just law-schools. Cf. *Green* v. *County School Board,* 391 U.S. 430, 442 (1968).

In enacting the Civil Rights Act of 1964, Congress made it clear in Title VI, §601, that no individual "person" be "excluded from participation in, * * * or be subject to discrimination under any program or activity receiving financial assistance" [42 U.S.C. 2000d]. Such a national policy

standard of equal protection of law is controlling, especially in the absence of some other previous *de jure* discrimination which might possibly justify color consciousness. See: *Swann* v. *Charlotte-Mecklenburg,* 402 U.S. 1, 17-18 (1971) interpreting the "anti-busing for racial balance" provision of Title IV of the Civil Rights Act of 1964 [42 U.S.C. 2000c-6 (a) (2)] as applicable to every *de facto* segregation case. And *Swann, supra,* made it clear that the need for color conscious plans to remedy the evils of past *de jure* segregation and which promise "realistically to work * * * *now* * * *" are limited in time duration "until it is clear that state-imposed segregation has been completely removed." *Swann, supra,* 402 U.S. 1, 13 (1971). But there was no such state imposed previous history of discrimination by the law school at Washington State, therefore, there was no justification for the denial of Marco DeFunis' equal right to be admitted to that law school. In any event, the reliance of the court below [507 P. 2d at 1179-1181] upon the desegregation cases was clearly misplaced, for in the judicial decrees of those cases no student was denied access to every public school in the affected jurisdiction but was merely shifted from one school to another in the same school district, whereas in the case of DeFunis he was excluded from the only public law school in the State of Washington.

Moreover, in this DeFunis case, there was completely absent any evidence of previous history in which the law school "openly discriminated on the basis of race." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 427 (1971). Nor was there any evidence that the law school had imposed tests "to discriminate because of race." *Griggs, supra,* 401 U.S. at 433. And just as a public school desegregation case, a law school

can carry "only a limited amount of baggage" [*Swann, supra,* 402 U.S. at 24] particularly when the law school is the only one in the State to carry that baggage.

Thus, particularly in the absence of any previous history of *de jure* discrimination at the law school against any "minorities," the denial of equal protection of law to Marco DeFunis is bad enough; but it is compounded by the fact that pre-law "minority" students are thus encouraged in the belief that they need not do well in preparing for law school simply because they will not be required to compete with "other" students for admission to the law school, but instead these "minorities" will only be "directly compared with one another, but * * * not compared to applicants outside of the minority group." *DeFunis* below, 507 P.2d at 1176. Thus, in blindly applying the mandate of the desegregation case of *Green* v. *County School Board,* 391 U.S. 430, 439 (1968) for a plan that "promises realistically to work *now*" [507 P. 2d at 1180], the court below would mandate both the denial of equal protection of the laws to "nonminorities" and the deterioration of academic excellence of "minorities," factors not present in the mere shifting of students between schools in a public school district as in *Green, supra,* 391 U.S. 430. And while preventing meritorious students like DeFunis and others similarly situated from ever becoming lawyers, the dual admissions program at the University of Washington law school thus serves to stigmatize "minority" lawyers later on in life. Prof. Graglia, *supra,* 119 Univ. of Penna. Law Rev., at 356 (1970).

Given the fixed maximum possible size of the first year law class at the University of Washington, the preference

given to certain "minorities" automatically worked out to a "certainly not benign" [507 P. 2d at 1182] policy with respect to Marco DeFunis. For all preferential quota systems violate the fundamental wisdom expressed by the Third Circuit Court of Appeals:

> "* * * American progress in its attempt to eradicate racial discrimination is due largely to the generally held belief that individuals, regardless of their race, creed, religion, sex, or national origin, should be accorded an equal chance to compete for the opportunities society provides—employment, education, and others—on the basis of individual ability. In our democracy, rights are accorded primarily to individuals, as distinguished from groups. Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others, lest we abandon the basic principle of non-discrimination that sparked the effort to pry open those doors in the first place."
>
> *Commonwealth of Pennsylvania* v. *O'Neill*, 41 LW 2162 (3rd Cir, 9/14/72); superseded *en banc*, 473 F. 2d 1029 (3rd Cir, 1973).

For the greatness of America stems from the idea of equal protection of the laws for every individual "person" [Amendment XIV] on an individual basis and not on the basis of quotas, goals for certain "minorities," or other such objectives for any particular group selected by the State. For injustice can never be remedied by injustice.

POINT II

There is no "compelling state interest" in securing proportional representation of certain "minority" group members in the student body of a State law school.

The court below, the Supreme Court of the State of Washington, attempted to justify the infringement of the individual rights of Marco DeFunis to Equal Protection by invoking the "compelling state interest" doctrine. *DeFunis* below, 507 P. 2d at 1182. However, in decision after decision, this Court has made it clear that the Equal Protection Clause guarantees the equality of access "on the graduate school level" of all persons within a given state "of the same educational qualifications." *Brown* v. *Board of Education,* 347 U.S. 483, 492 (1954) citing: *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1938); *Sipuel* v. *Board of Regents of University of Oklahoma,* 332 U.S. 631 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339 U.S. 637 (1950). Yet no case upholds any purported right of "minority" students to secure "proportional representation" [*DeFunis* below, 507 P. 2d at 1184] in any institution of higher learning where only a limited number of seats are available. Indeed, this Court has indicated just the opposite, for this Court itself has supported state action designed to *suppress* picketing for the purpose of securing for "minorities" any "proportional employment." *Hughes* v. *Superior Court of California,* 339 U.S. 460, 464 (1950). For racial preferences in state law school admissions policies cause the same, if not worse, type of "mischief"

[*Hughes, supra*, 339 U.S. at 464] which racial preferences in employment involve. And this Court has itself further warned that nobody can expect to be hired on the job "simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

While the Constitution does not bar *private* schools which "discriminate against students for reasons wholly unrelated to individual merit"; *Norwood* v. *Harrison*, 36 L Ed 2d 723, 733 (June 25, 1973); nevertheless, such discrimination may not receive any "material aid from the State" [*Norwood, supra*, 36 L Ed 2d at 734] even merely by way of the State's lending of textbooks to the pupils in such private schools. Therefore, *a fortiori*, a *State* school such as the University of Washington may not conduct a discriminatory admissions policy whereby certain members of "minority" groups are offered admission ahead of more qualified other applicants.

The dual admissions program which denied DeFunis his equal chance to be accepted to the University of Washington Law School did not satisfy even the test of "rational relationship" to "permissible state objectives" [*Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969)], let alone satisfy the test of "compelling state interest"; for the dual admissions program of itself introduced mischief and evils, because race, religion, color, or ethnic background can have no rational relationship to "educational qualifications" [*Brown, I*, 347 U.S. at 492] of "any person" in our society under the Equal Protection Clause of the Fourteenth Amendment. As stated by this Court some time ago:

"The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. * * * Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948).

Conclusion

Because the introduction of the racially dual admissions program by the University of Washington Law School denied to Marco DeFunis his constitutional right of equal opportunity of access to the Law School, the judgment of the Supreme Court of the State of Washington should be reversed, to enable Mr. DeFunis to complete his law school education.

Respectfully submitted,

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